

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MESLEY O. WALKER and U.S. POSTAL SERVICE,
POST OFFICE, Burlingame, CA

Docket No. 99-775; Submitted on the Record;
Issued July 6, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment in the amount of \$4,825.58 for the period December 30, 1996 through November 8, 1997; (2) whether the Office properly determined that appellant was not entitled to a waiver of recovery of overpayment; and (3) whether the Office properly recovered the overpayment from appellant's continuing compensation.

In the instant case, the Office accepted that appellant sustained de Quervain's tenosynovitis, left carpal tunnel syndrome and left cubital tunnel syndrome as a result of his federal employment. The Office placed appellant on the periodic compensation rolls and during the period December 30, 1996 through November 8, 1997 appellant received wage-loss compensation in the amount of \$16,496.00. By letter dated November 20, 1997, the Office made a preliminary determination that an overpayment of compensation had occurred. The Office explained that during the period December 30, 1996 through November 8, 1997 an overpayment occurred as a result of a miscalculation of appellant's weekly pay rate and the failure to deduct life insurance premiums. Whereas appellant's compensation had been calculated based on a weekly pay rate of \$553.38, the Office indicated that appellant's actual weekly pay rate was \$391.50.¹ The Office explained that the initial weekly pay rate of \$553.38 erroneously included overtime pay. Based on this miscalculation, appellant received an overpayment of \$4,825.58. The Office further indicated that the failure to deduct life insurance premiums resulted in an additional overpayment of \$39.60. Appellant was further advised that he was not at fault in creating the overpayment.

In challenging the Office's preliminary determination, appellant took issue with the Office's recalculation of his weekly pay rate. Appellant argued that, because his position required him to work 12 hours per day, 7 days per week, the pay he received for work in excess

¹ This latter figure was based on a 40-hour work week with an hourly rate of \$9.00 plus a 10 percent night differential for 7 hours per workday. The Office's initial calculation of \$553.38 represented the average weekly compensation appellant received during calendar year 1996. Appellant's biweekly pay during 1996 ranged from a low of \$454.00 to a high of \$1,603.60.

of 40 hours per week should be taken into account in determining his weekly pay rate. Additionally, he requested a waiver of recovery of overpayment and he submitted the requisite financial information in support of his request.

By decision dated January 8, 1998, the Office finalized the overpayment determination with respect to the \$4,825.58 attributable to the miscalculation of appellant's weekly pay rate.² The Office also denied appellant's request for a waiver of recovery of overpayment. Lastly, the Office determined that the overpayment would be recovered by deducting \$100.00 per month from appellant's continuing compensation.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$4,825.58 for the period December 30, 1996 through November 8, 1997. The Office correctly noted that overtime pay may not be taken into account in determining the rate of pay for compensation purposes.³ The weekly pay rate of \$553.38, which the Office used as a basis for calculating appellant's entitlement to compensation during the period December 30, 1996 through November 8, 1997, erroneously included overtime pay. Accordingly, the Board finds that the Office properly determined that an overpayment of compensation was created.

Additionally, the Board finds that appellant is not entitled to a waiver of recovery of overpayment.

Section 8129 of the Federal Employees' Compensation Act provides that an overpayment must be recovered unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."⁴ An individual who is found to have been at fault in helping to create the overpayment is not eligible for a waiver of recovery of overpayment.⁵ In the instant case, the Office determined that appellant was not at fault in creating the overpayment.

² The Office's decision did not mention the additional overpayment of \$39.60 resulting from the failure to deduct life insurance premiums. It is not entirely clear from the record why the Office declined to pursue this particular issue.

³ 5 U.S.C. § 8114(e)(1); *Robert D. Clark*, 48 ECAB 422, 427 (1997).

⁴ 5 U.S.C. § 8129(a), (b).

⁵ *Bonnye Mathews*, 45 ECAB 657, 667 (1994).

To determine whether recovery of an overpayment from an individual who is without fault would defeat the purpose of the Act, the first test under 5 U.S.C. § 8129(b) as specified in 20 C.F.R. § 10.322(a) provides as follows:

“(a) General. Recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving a presently or formerly entitled beneficiary of income and resources needed for ordinary and necessary living expenses under the criteria set out in this section. Recovery will defeat the purpose of this subchapter to the extent that:

(1) The individual from whom recovery is sought needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and

(2) The individual’s assets do not exceed the resource base of \$3,000.00 for an individual or \$5,000.00 for an individual with a spouse or one dependent plus \$600.00 for each additional dependent. This base includes all of the claimant’s assets not exempted from recoupment....”⁶

An overpaid individual must meet both conditions set forth under section 10.322(a)(1) and (2) before recovery of the overpayment can be waived on the basis that it would defeat the purpose of the Act. Consequently, to establish that recovery would defeat the purpose of the Act, the facts must show that appellant needs substantially all of his income to meet his current ordinary and necessary living expenses and also that his nonexempt assets do not exceed the applicable resource base.⁷ Based upon financial information provided by appellant, the Office properly calculated that appellant’s monthly income exceeded his monthly expenses by more than \$350.00. Accordingly, appellant has failed to satisfy the first prong of section 10.322(a), and the Office properly concluded that appellant would not be deprived of income and resources needed for ordinary and necessary living expenses.⁸ With respect to the second prong under section 10.322(a), appellant reported assets of at least \$29,000.00, which is well in excess of the applicable resource base of \$3,000.00.⁹

The financial information submitted by appellant showed that he did not meet the financial criteria under which the Office would consider waiver of recovery of overpayment on the grounds that recovery would defeat the purpose of the Act. Moreover, appellant did not argue that he was entitled to waiver on the grounds of equity and good conscience, and there is no evidence that appellant relinquished a valuable right or changed his position for the worse in

⁶ 20 C.F.R. § 10.322(a).

⁷ *Robert D. Clark*, *supra* note 3; *Robert E. Wenholtz*, 38 ECAB 311 (1986).

⁸ See *James Lloyd Otte*, 48 ECAB 334 (1997) (where the appellant had approximately \$200.00 of monthly income in excess of expenses).

⁹ Appellant advised the Office that he had \$14,000.00 invested in an individual retirement account and another \$15,000.00 invested in U.S. Treasury bonds.

reliance on the excess compensation payments he received.¹⁰ The Office, therefore, did not abuse its discretion in denying appellant's request for waiver of recovery of the overpayment.

The Board further finds that the Office properly required repayment by withholding \$100.00 every four weeks from appellant's continuing compensation.

Section 10.321 of the Office's regulations provides:

"Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual."¹¹

As noted above, the Office reviewed appellant's reported income and expenses and properly calculated that his monthly income exceeded his monthly expenses by more than \$350.00. The Board finds that the Office gave due regard to appellant's financial circumstances in determining the rate of repayment in this case.

The January 8, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.

July 6, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

¹⁰ See 20 C.F.R. § 10.323(b).

¹¹ 20 C.F.R. § 10.321(a).